No. 83156-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO GARCIA-SALGADO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

> "All that is missing here is a specific finding by the trial court of probable cause."

State v. Garica-Salgado, 149 Wn.App. 702, 707, 205 P.3d 914 (2009). Despite that recognition, the Court of Appeals concluded a pretrial order directing Mr. Garcia-Salgado to provide a biological sample for DNA testing complied with the warrant requirement of the Fourth Amendment and Article I, section 7 of the Washington Constitution.

Contrary to the conclusion of the Court of Appeals, the absence of a finding of probable cause is not minor a defect which can be cast aside. Instead, because of that defect the searches of Mr. Garcia-Salgado's person and genetic material violate the Fourth Amendment and Article I, section 7.

Mr. Garcia-Salgado's argument does not rest upon semantics - the use of an order as opposed to a warrant. Rather, regardless of whether the documents used are titled "order" rather than "warrant" or "motion" as a opposed to "affidavit," the procedure employed by the trial court and endorsed by the Court of Appeals fails to even minimally satisfy the warrant requirement of the Fourth

Amendment and Article I, section 7. Thus, this Court must reverse the Court of Appeals' opinion issued in this case.

But beyond the erroneous legal analysis employed by the lower courts, the additional facts revealed by the State since this Court accepted review further demonstrate the errors in the Court of Appeals opinion and should lead this Court to bar the State from seeking any further searches of Mr. Garcia-Salgado's person or genetic material.

B. ISSUES PRESENTED

1. Under the Fourth Amendment and Article I, section 7 of the Washington Constitution the taking of a biological sample from a person accused of a crime is a search which must be predicated on a search warrant issued upon a sworn statement establishing probable cause to believe the search will lead to evidence of the crime. Is the warrant requirement violated where: (1) there is no statement under oath establishing probable case to believe the taking of a biological sample from Mr. Garcia-Salgado would yield evidence of the crime, and (2) there is no finding of probable cause to support the search?

2. With respect to post-charging searches does CrR 4.7(b)(2) eliminate the requirement of a search warrant for

purposes of the "authority of law" requirement of Article I, section 7?

3. In reviewing the adequacy of a search warrant on appeal, may the reviewing court look beyond the face of the warrant and affidavit to find facts that might have supported issuance of the warrant?

4. Is the "oath or affirmation" requirement satisfied so long as the State has previously filed, in support of the information, an affidavit of probable cause to believe a person has committed a crime?

5. Article I, section 7 of the Washington Constitution affords heightened privacy protections enforced by a robust exclusionary remedy. Although this Court has recognized an "independent source" exception to the exclusionary rule, it has done so only where the State did not initially seize the unlawfully viewed evidence and seized it only pursuant to a valid warrant obtained promptly after the initial violation. Where the State has flagrantly violated Mr. Garcia-Salgado's privacy rights by misstating facts in support of the initial search, should the State be permitted a new opportunity more than three years later to seek to lawfully obtain the evidence?

C. SUMMARY OF THE CASE[1]

Police responded to Joylene Simmons;s 911 call complaining that Mr. Garcia-Salgado had raped her daughter P.H. 9/19/07 RP 79. Mr. Garcia-Salgado was arrested and while at the Auburn Police station made a statement that he had not had intercourse with P.H. 9/19/07 RP 164.

The State charged Mr. Garcia-Salgado with a single count of first degree rape of a child, as well as possession of cocaine, for drugs found at the time of his arrest. CP 1-5.

Prior to trial the deputy prosecutor asked the court to order Mr. Garcia-Salgado to submit a biological sample to permit DNA testing. 3/23/07 RP 3. The deputy prosecutor stated

> There are DNA issues on the case. I have confirmed with the lab, as of yesterday, they are in the process of doing DNA testing on this case. There were other tests that were already performed - - presumptive tests that were performed by the lab. I have made sure someone has been assigned for DNA analysis.
>
> The detective did not get a DNA swab from the defendant. I have e-mailed defense counsel about whether or not he is willing to help the detective facilitate that or whether a motion needs to be set to the defendant's DNA swab for DNA testing.

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[1] The facts adduced at trail are set forth in Mr. Garcia-Salgado's Petition for Review.

3/23/07 RP 3. The State now concedes no evidence was submitted to the Washington State Patrol Crime Laboratory until March 27, 2007, five days after the deputy prosecutor claimed to have personally "confirmed" that genetic testing was ongoing.[2]

Because Mr. Garcia-Salgado objected, the motion was continued. At that subsequent hearing the deputy prosecutor stated

> It is typical for defense attorneys not to be ecstatic about giving DNA of the client's to the State. . . . . However, despite this lack of enthusiasm, courts regularly grant State permission to get such a sample in the interest of justice.

3/27/07 RP 3. The trial court specifically inquired whether the samples obtained from the victim had been tested to find DNA other than the victim's. Id. at 4. The State responded: "I believe the presumptive tests were done, and there was something on them: I couldn't say exactly what at this point in time." Id. at 5. It is now clear, however, that contrary to the deputy prosecutor's assertions, no genetic testing had occurred as the evidence was

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[2] By letter dated December 16, 2009, counsel for the State, James Whisman, who was not the trial deputy, informed counsel that he had learned that the evidence was not submitted for testing until after the trial court ordered the search. The parties agree this Court should consider this new information in resolving the issues before it in this case. Thus, the letter is attached as an Appendix to this brief, and it is counsel's understanding that it is an Appendix to the State's brief as well.

not sent to the crime lab until the day of this second hearing. But in any event, nowhere in the unsworn statement of the deputy prosecutor to the trial court was there mention of genetic material having been found on the victim's clothing.

Over Mr. Garcia-Salgado's objection, the court granted the State's request. Id. at 5. But rather than determine probable cause existed to issue a search warrant, the court merely issued an order finding the method of gathering the sample, a cheek swab, was minimally intrusive. CP 6.

Because the order authorizing the searches was not based upon probable cause supported by oath or affirmation, Mr. Garcia-Salgado appealed the searches. The State responded that because charges had been filed, a search warrant was not required and instead CrR 4.7 allowed the court to order Mr. Garcia-Salgado to submit to the searches. Brief of Respondent at 13.

The Court of Appeals agreed that a search warrant was not required because charges had been filed. Garcia-Salgado, 149 Wn.App. at 706-07. The Court of Appeals concluded probable cause existed to support the search ordered by the court. Id. at 706. However, because the State had not filed an affidavit in support of its request for a search warrant, the Court of Appeals

factual conclusion was not based upon its review of the face of the warrant nor an incorporated affidavit. Instead, the Court of Appeals looked to facts alleged in the affidavit establishing probable cause to support the initial charge and to facts testified to at trial. Id. at 706.

After this Court granted review, counsel for the state, who was not the trial prosecutor, informed counsel for Mr. Garcia-Salgado that contrary to the deputy prosecutor's claims when she requested the order, forensic testing had not been performed on the evidence in this case at the time the request for an order was made. Appendix. Indeed, this new evidence reveals that the evidence was not even submitted to the Washington State Patrol Crime Laboratory until March 27, 2007, four days after the State's initial request and the same day the court issued its order.

D. ARGUMENT

1. BECAUSE IT DID NOT COMPLY WITH THE WARRANT REQUIREMENT, THE SEARCH IN THIS CASE VIOLATED THE STATE AND FEDERAL CONSTITUTIONS.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

> searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 7 of the Washington Constitution provides:

> No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

The warrant requirement is particularly important under the Washington Constitution "as it is the warrant which provides 'authority of law' referenced therein." State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)).

Here the order issued by the court provides:

FILED
KING COUNTY, WASHINGTON

MAR 2 7 2007

SUPERIOR COURT CLERK
LESLIE J. KEITH
DEPUTY

CERTIFIED COPY TO COUNTY JAIL MAR 2 7 2007

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON, Plaintiff,

vs.

Alejandro Garcia-Salgado, Defendant.

NO. 06122557 KNT

ORDER ON CRIMINAL MOTION (ORCM)

The above-entitled Court, having heard a motion regarding taking of DNA sample of defendant

IT IS HEREBY ORDERED that a DNA sample of defendant's DNA shall be taken by oral swab (DNA swab is minimally intrusive, & under CrR 4.7(b)(2)(vi) it shall be taken) & defendant must cooperate.

DATED: 3/26/07

[signature] JUDGE

[signature] Deputy Prosecuting Attorney 31600

[signature] Attorney for the Defendant 30473

Order on Criminal Motion (ORCM) 05/03

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CP 6. As is clear from this document, the searches in this case were not authorized by a warrant and were not based by probable cause supported by oath or affirmation.

a. The collection of a biological sample and a subsequent genetic or chemical analysis of the sample each constitute a separate search under the Washington and United States constitutions. The collection and subsequent analysis of biological samples from an individual constitutes a search for purposes of the Fourth Amendment. Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S.Ct. 1281, 149 L.Ed. 2d 205 (2001); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989); State v. Olivas, 122 Wn.2d 73, 83-84, 856 P.2d 1076 (1993). Moreover, such actions infringe upon the privacy interests protected by Article I, section 7 of the Washington Constitution. State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991).

Under both the federal and state constitutions, the collection and subsequent analysis of biological evidence from a person is not a single search but rather involves at least two separate invasions of privacy. The Supreme Court has said:

> [I]it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests.

Skinner, 489 U.S. at 617 (Internal citations omitted); see also, Robinson v. Seattle, 102 Wn.App. 795, 822 n.105, 10 P.3d 452 (2000).

Thus, there can be no question that the collection and subsequent analysis of the biological sample from Mr. Garcia-Salgado each constituted a search for purposes of the Fourth Amendment as well as Article I, section 7. See, Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) (blood draw "plainly constitutes search[]" for purposes of Fourth Amendment).

The State has previously conceded the compelled production of a biological from Mr. Garcia-Salgado was a search. See generally Brief of Respondent at 13 (contending warrant requirement ceases to apply to searches conducted after defendant charged). The opinion of the Court of Appeals, too, accepts the conclusion that the taking of a biological sample from Mr. Garcia-Salgado was a search. Garcia-Salgado, 149 Wn.App. at 705. But like the State, the court concluded that a statement of probable cause in support of the filing of charges was sufficient to support any subsequent search. Id. at 704 n.2. In analyzing the warrant in this case, it is clear there is no a statement of probable cause made

in support of the request for a warrant much less a statement that makes the more specific showing required by Schmerber for collection of a biological sample.

b. The search endorsed by the Court of Appeals does not satisfy the warrant requirement. With respect to searches "involving intrusions beyond the body's surface," Schmerber held "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence might be obtained." 384 U.S. 757. The Court said the existence of probable cause to believe a person has committed the offense is not alone sufficient to justify such a search; "the mere fact of a lawful arrest does not end our inquiry." Schmerber, 384 U.S. at 769. In fact, Schmerber expressly requires an additional finding beyond simply probable cause to believe a crime has beyond committed: "a clear indication" that the desired evidence will be found." The state and federal constitutions require this standard be met even after charges have been filed. See, State v. Gregory, 158 Wn.2d 759, 820-25, 147 P.3d 1201 (2006) (discussing validity of blood draw obtained pursuant to post-arrest search warrant).

Here the State offered nothing to support its request for a search, certainly nothing that meets the "oath or affirmation" component of the warrant requirement. The State did not file an affidavit detailing the facts which it believed established probable cause generally or the more specific standard required by Schmerber.

At the hearing on its motion the State claimed it was entitled to such search "in the interest of justice" and that such requests were "routinely granted." 3/27/07 RP 3. In response to the court's question of whether genetic material had been recovered, the State responded "I believe the presumptive tests were done, and there was something on them: I couldn't say exactly what at this point in time." 3/27/07 RP 5. On their face, those unsworn claims do not support a finding of probable cause sufficient to issue a warrant. Those claims, and the order issued by the court, do not even hint at the constitutional dimension of such a search, instead treating them as a matter of routine.

But that is not the end of it. As the State now acknowledges, no forensic testing had occurred, and in fact no evidence was submitted to the crime laboratory until after the court authorized the search of Mr. Garcia-Salgado. Appendix. Thus, whether the trial

deputy prosecutor was merely reckless with respect to a readily verifiable fact, or had some greater ill intent, the factual basis, thin as it was, evaporated. Thus, in the end, the State's request for a search was premised entirely on its view of the routine nature of such searches.

The recently revealed facts illustrate the import of the oath-or-affirmation requirement. Even if the misstatement was unintentional, making a statement in open court is different in kind from making a statement subject to the penalty of perjury. An affiant more carefully considers the words she uses, and unless the affiant is simply willing to ignore the law, she will seek to ensure the accuracy of her claims. Thus an advocate will know that when she claims to have personally confirmed the occurrence of a fact which has not yet occurred, she will be subject to criminal, civil or professional sanctions. That is precisely the point of an affidavit in support of a search warrant.

There is no requirement that the sworn statement come from the prosecutor. Indeed, a statement from the forensic scientist and/or detective as to what has been found and what is expected to be found would be preferable as it eliminates the possibility of miscommunication and would avoid making the prosecutor a

witness with the associated problems that flow from that. See, Kalina v. Fletcher, 522 U.S. 118, 129-30, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (discussing ethical problem under RPC 3.7 as well as loss of absolute immunity where prosecutor becomes witness by attesting to facts necessary to establish probable cause).

In the absence of any sworn statement in support of the search, the Court of Appeals concluded the affidavit of probable cause supporting the filing of the charge was sufficient to support the subsequent search. Garcia-Salgado, 149 Wn.App. at 705, n.2. The affidavit of probable cause is silent on chemical or genetic evidence or testing. The affidavit of probable cause does not provide a "clear indication that the desired evidence will be found" as a result of the searches authorized by the trial court's orders. A statement of probable cause which does not mention either a search or the evidence sought in the search is not sufficient to support a warrant.

Faced with the absence of any mention of genetic material or testing in the affidavit of probable cause, the opinion of the Court of Appeals borrows facts established for the first time at trial. Garcia-Salgado, 149 Wn.App at 706. For instance, the court

concludes probable cause existed because "genetic material was discovered on [P.H.'s] clothing. Id. First, that information was not revealed until the trial testimony of the forensic technician. Second, as is clear from the State's recent disclosure, that information could not have been the basis of the search because no genetic testing had occurred at the time the trial court issued its order. Appendix.

If the affidavit of probable cause may be relied upon to justify a subsequent search, even where that affidavit does not mention the place or item to be searched, there is no limit to the type and number of searches which are authorized, whether it is a search of a defendant's home, bank records, or his genetic material. Nonetheless, the Court of Appeals concluded the warrant requirement is eliminated upon charging, and instead CrR 4.7 provides the necessary authority of law. Garcia Salgado, 149 Wn.App. at 706-07.

But that conclusion is wrong for a number of reasons. First, the plain language of CrR 4.7 states that it is subject to constitutional requirements and does not purport to eliminate them. Second, the "authority of law" required under Article I, section 7 cannot come from a statute or rule which purports to eliminate the warrant requirement. Ladson, 138 Wn.2d at 352, n. 3. Third,

Gregory held that "in order to comply with the Fourth Amendment a blood draw pursuant to CrR 4.7(b)(2)(vi) must be supported by probable cause." 158 Wn.2d. at 822. Gregory then parroted the Fourth Amendment standard for collection of physical evidence from a suspect. Id. (citing Schmerber, 384 U.S. at 767). Neither Gregory nor the federal cases on which it relied eliminated either the warrant requirement or the oath-or-affirmation requirement. 158 Wn.2d. at 822.

Among the purposes served by the warrant and affidavit is that they both establish and limit the facts which a reviewing court can or must examine when faced with a challenge to a warrant. Where an affidavit is insufficient it cannot be rehabilitated by evidence known by the affiant but not disclosed to the issuing magistrate. Whiteley v. Warden, 401 U.S. 560, 564, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).[3] "In reviewing a probable cause determination the information considered is that which was before the issuing magistrate." State v. Remboldt, 64 Wn.App. 505, 509,

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[3] In Arizona v. Evans, 514 U.S. 1, 13-14, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), the Court recognized the correctness of Whiteley's analysis finding a Fourth Amendment violation, the portion relevant to the present discussion, but disagreed with its application of the exclusionary rule to that violation.

827 P.2d 282 (1992) (citing inter alia State v. Patterson, 83 Wn.2d 49, 55, 515 P.2d 496 (1973)). In addition, on review "[t]he suppression ruling stands and falls on its own merits, based upon the evidence before the suppression judge, not what is later developed at trial." State v. Meckelson, 138 Wn.App. 431, 438, 135 P.3d 991 (2006) (citing Ladson, 138 Wn.2d at 350), review denied 159 Wn.2d 1013 (2007). Contrary to the Court of Appeals opinion there was absolutely no evidence before the trial court at the time it was asked to issue the warrant that any genetic material had been recovered from any item of evidence.

The procedure used here does not limit the facts upon which the validity of the warrant is to be judged. The order authorizing the search, the "warrant," does not contain any statement of facts supporting probable cause. The order does not incorporate nor even attach a motion supporting the search which contains a statement of facts, and of course none was filed. The order does not in any way identify or limit those facts which purport to establish probable cause. Thus, there is no factual basis upon which to review the scope of the warrant or even its very legitimacy.

But rather than recognize what should be a fatal defect in the warrant, the Court of Appeals simply mined the entire appellate

record for facts which it believed established the probable cause necessary to support the warrant, while allowing "more specific findings would be helpful." Garcia-Slagado. 149 Wn.App. at 707. First, there is no way to know if the trial court made a finding of probable cause at all. Second, and assuming the trial court did make a finding of probable cause, there is no way to know the facts the Court of Appeals identified were the facts on which the trial court relied to find probable cause. The absence of a sworn statement establishing probable cause and the absence of a finding of probable cause are not mere technicalities. Instead, those flaws invalidate the warrant.

As is clear from the face of the order the trial court did not make a finding of probable cause. The only finding the court made was that the means of collection of a sample was minimally intrusive. CP 6. To the extent a "motion" and "order" may take the place of an "affidavit" and "warrant" they must still satisfy the constitutional standard of probable cause based upon a sworn statement. The procedure employed here and endorsed by the Court of Appeals does not do that. The searches of Mr. Garcia-Salgado and his genetic material violate the Fourth Amendment and Article I, section 7.

c. This Court should reverse Mr. Garcia-Salgado's conviction and remand for a new trial free of the fruits of the unlawful search. Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a direct result of the search as well as evidence which is derivative of the illegality, the "fruits of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Article I, section 7 also requires exclusion of evidence obtained in violation of its terms. State v. White, 97 Wn.2d 92, 111, 640 P.2d 1061 (1982).

Evidence that Mr. Garcia-Salgado's genetic profile matched that found in the evidentiary semen sample was a fruit of the unlawful searches and should have been suppressed. Article I, section 7 does not permit an inevitable discovery exception to the exclusionary rule State v. Winterstein, 2009 WL 4350257, 5. Thus, the State cannot contend the evidence would have been discovered depite the unlawful search which occurred. The evidence must be suppressed.

2. THE STATE'S EGREGIOUS VIOLATIONS OF MR. GARCIA-SALGADO'S CONSTITUTIONAL PRIVACY RIGHTS SHOULD PRECLUDE ANY EFFORT O OBTAIN ADDITIONAL DNA TESTING.

If this Court concludes the searches at issue here violated the Fourth Amendment and Article I, section 7 and remands the matter, Mr. Garcia-Salgado expects the State will seek another biological sample and argue it is independent of the prior unlawful search. Because of the State's actions in seeking the initial unlawful search, this Court should refuse to permit such an additional search. Because resolution of this issue is necessary to determine what procedures may be employed on remand, this Court should resolve the question. Winterstein, at 5.

Article I, section 7 affords significantly greater privacy protection than the Fourth Amendment to the United States Constitution. Const. Art. I, § 7; State v. Parker, 138 Wn.2d 486, 493, 987 P.2d 73 (1999); see e.g., State v. Miles, 160 Wn.2d 236, 244 n.4, 156 P.3d 864 (2007) (banking records are "private affairs" protected by Article I, section 7, even though they are not protected by the Fourth Amendment). Furthermore, Washington's privacy clause is enforced by an exceptionally strong, constitutionally mandated exclusionary rule. Winterstein, at 6 (2009); See Charles

W. Johnson, The Origin of Article I, Section 7 of the Washington State Constitution, 31 Seattle Univ. L. Rev. 431, 456 (2008). That exclusionary remedy cannot permit the State to simply obtain a new DNA sample on remand in light of the State's action in this case.

a. Article I, section 7 mandates a robust exclusionary rule to enforce its heightened privacy protections. During the time when most states refused to follow the United States Supreme Court's adoption of an exclusionary remedy, Washington became the fifth state to do so in State v. Gibbons, 118 Wash. 171, 203 P.390 (1922) (following Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). See Sanford E. Pitler, Comment, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wash. L. Rev. 459, 472 (1986). This Court concluded that "it is beneath the dignity of the state, and contrary to public policy, for the state to use for its own profit evidence that has been obtained in violation of law." State v. Buckley, 145 Wash. 87, 258 P.1030 (1927).

Pressure to alter the automatic nature of Washington's exclusionary rule increased when the U.S. Supreme Court decided against extending the federal exclusionary rule to the states in Wolf

v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). Pitler, 61 Wash.L.Rev. at 484. But our state refused "to recede one iota" from its commitment to a mandatory exclusionary rule because "the wisdom of the ages has taught that unrestrained official conduct in respect to depriving men of their liberties would soon amount to a total loss of those liberties." Id. at 485 (citing State v. Young, 39 Wn.2d 910, 917, 239 P.2d 858 (1952) and State v. Miles, 29 Wn.2d 921, 190 P.2d 740 (1948)).

Mapp v. Ohio extended the exclusionary rule to all states, explaining that it was an element of the right to privacy. 367 U.S. 643, 655-56, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." Mapp, 367 U.S. at 656. The exclusionary rule not only protects the constitutional rights of individuals, but gives "to the courts, that judicial integrity so necessary in the true administration of justice." Mapp, at 660.

As federal courts later retreated from their commitment to suppress illegally obtained evidence, this Court consistently held firm, asserting that "the language of our state constitutional provision constitutes a mandate that the right of privacy shall not be diminished by the judicial gloss of a selectively applied exclusionary

remedy." White, 97 Wn.2d at 110. Thus, Washington courts have refused to adopt exceptions to the exclusionary rule accepted by federal and other state courts. See, e.g., Id. (affirming Mapp and rejecting good faith exception adopted in Michigan v. DeFillippo, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979)); State v. Morse, 156 Wn.2d 1, 9-10, 123 P.3d 832 (2005) (court has "long declined to create 'good faith' exceptions to the exclusionary rule"); State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2003) (refusing to apply inevitable discovery exception to the exclusionary rule where doing so would create "no incentive for the State to comply with Article I, section 7's requirement[s]"); Winterstein, at 8-9 (rejecting the inevitable discovery exception). Our exclusionary rule is mandatory because Article I, section 7 "clearly recognizes an individual's right to privacy with no express limitations." White, 97 Wn.2d at 110.

Indeed, instead of narrowing the exclusionary rule, Washington courts have "extended the exclusionary rule beyond the original Fourth Amendment context." State v. Bonds, 98 Wn.2d 1, 9-10, 653 P.2d 1024 (1982) (citing as examples the Court's suppression of evidence obtained pursuant to unlawful misdemeanor arrests and to evidence obtained in violation of

statutes). Bonds explains the rationale for a strong exclusionary rule in Washington: "first, and most important, to protect the privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means." Bonds, 98 Wn.2d at 12.

b. Washington's robust exclusionary rule does not tolerate an extension of the independent source exception to the facts of this case. As is clear from the preceding discussion, the absence of a valid warrant required suppression of the genetic testing performed in this case. Although this Court has recognized an "independent source" exception to the exclusionary rule, it must be narrowly construed in light of the above history and in light of the problems inherent in such an exception. See State v. Gaines, 154 Wn.2d 711, 713, 116 P.3d 993 (2005) (recognizing independent source exception under article I, section 7).

The United States Supreme Court endorsed an independent source exception to the exclusionary rule for Fourth Amendment violations in Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). In that case, federal agents entered a

warehouse unlawfully, saw numerous burlap-wrapped bales later found to contain marijuana, left, obtained a search warrant, returned eight hours later, and seized the marijuana. Id. at 535-36. The Court held the evidence would be admissible under an "independent source" exception to the exclusionary rule if (1) the agents' decision to seek the warrant was not prompted by what they had seen during the unlawful search, and (2) the information gathered from the unlawful search did not affect the magistrate's decision to issue the warrant. Id. at 542-43. Because the answer to the first question was unclear from the record, the Court remanded the case for a determination of whether the source was truly independent. Id. at 543-44.

Scholars have denounced the independent source exception as outlined in the Murray decision because it undermines privacy protections and contravenes a major purpose of the exclusionary rule – to deter government misconduct. For example, the Harvard Law Review lamented:

> In Murray v. United States, the Court eviscerated its protection of fourth amendment rights by expanding the scope of an exception to the exclusionary rule while dismissing too easily the undesirable effects its decision will have on deterrence of police misconduct. By holding that evidence discovered during an illegal search may be admitted if officers subsequently

> obtain an "independent" search warrant and "rediscover" the evidence, the Court in Murray granted police the incentive to make illegal "confirmatory" searches before seeking a warrant, and thereby undermined citizens' fourth amendment rights to privacy and security in their homes.

The Supreme Court, 1987 Term: Leading Cases, 102 Harv. L. Rev. 143, 162 (1988). Simply put, "[i]n Murray, ..., there was *no sanction* for the constitutional violation. Consequently, there is *no deterrence* as to future violations." Craig M. Bradley, Murray v. United States: The Bell Tolls for the Search Warrant Requirement, 64 Ind. L.J. 907, 912 (1989) (emphasis in original).

> The holding in Murray will encourage future police to break into houses, see if there is anything there, and then go for a warrant. The "warrant requirement," as a protection of the citizenry against unauthorized police intrusions, is thus rendered nugatory.

Id. at 914.

Another commentator agreed that

> [t]he majority in Murray, ... has honed a rule which provides little deterrence to unlawful police conduct, forgetting that 'the purpose of the exclusionary rule is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'

Jeffrey L. Kirchmeier, Casenote: Murray v. United States: Legally Rediscovering Illegally Discovered Evidence, 39 Case W. Res. 641, 650 (1989) (quoting Mapp, 367 U.S. at 656). Kirchmeier argues

that "a court should exclude the evidence in the Murray situation, giving 'to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.'" Id. at 650-51 (quoting Mapp, 367 U.S. at 660).

Because of the heightened privacy rights of Washington residents this Court has refused to retreat from a broad and protective exclusionary rule. Accordingly, Washington's independent source exception must be construed much more narrowly than its federal counterpart.

Gaines stressed that the evidence in question, admissible under the independent source exception, "*was not seized* during the initial [unlawful] glance into Norman's trunk," but only pursuant to a lawful warrant. Gaines, 154 Wn.2d at 717 (emphasis added). The same was true in State v. Coates, the primary case relied upon in Gaines: "In both cases, a constitutional violation occurred that revealed that a weapon was inside an automobile. *In neither case was the evidence immediately seized.*" Id. at 720 (discussing State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987)). And in both cases

a warrant was procured within 24 hours of the initial violation. Id. at 714-15, 719.

The exclusionary remedy must be applied where, as here, the State effects flagrantly unlawful searches. The State did not just technically violate the warrant requirement. Instead the deputy prosecutor affirmatively misstated the factual basis of her request claiming she had spoken with the crime lab regarding testing in this case and was told that preliminary tests had been performed. The State now acknowledges none of that could have been true, because the evidence had not yet been submitted to the laboratory. Based upon the deputy prosecutor's misstatement of fact, the court ordered Mr. Garcia-Salgado submit to the search. The evidence *was* immediately seized during that initial unlawful search and was submitted to a jury which convicted Mr. Garcia-Salgado. In light of that conduct, to allow the State to seek a new search warrant more than three years after the initial unlawful search would stretch the exception beyond the breaking point.

To allow the State to return to the trial court and "make it right" would be an endorsement of the approach allowed in Murray and would be an abandonment of the strict exclusionary remedy required by the Article I, section 7. To allow the State a second

chance in this case provides no future deterrence of similar conduct. To allow the State another opportunity fails to protect the integrity of the justice system. Permitting the State to return to the trial and obtain another genetic sample from Mr. Garcia-Salgado fails to give substance to the State's flagrant violation of the Washington Constitution.

Under such circumstances, the independent source exception must not apply.

E. CONCLUSION

Because the opinion of the Court of Appeals is contrary to the clearly settled constitutional jurisprudence of this Court and the United States Supreme Court, this Court should reverse the Court of Appeals' opinion, and order suprression of the fruits of the unlawful search.

Respectfully submitted this 15th day of January, 2010.

GREGORY C. LINK – 25228
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December 16, 2009

RE: State v. Garcia-Salgado, S.Ct. No. 83156-4

Dear Mr. Link,

This letter is to inform you that I have discovered some information that is likely relevant to your appellate claims, but that appears to have gone unnoticed up to this point in the appellate process.

While doing a detailed background investigation into this case yesterday, I learned that the Washington State Patrol Crime laboratory appears to have received the evidence in this case on 3/27/07, four days after the omnibus hearing, and the same day as the hearing wherein the court authorized a cheek swab be taken. Since the evidence had not been received before 3/27/07, it appears that there was no testing done by the lab before that date. Thus, the prosecutor's statements, that presumptive tests had been done as of 3/27/07, appear to have been incorrect. This information was used by the trial court to authorize taking the cheek swab from your client.

I have not completed looking into this matter but, since we both have to file briefs by Friday, I wanted to alert you to this new factual information as soon as possible.

Please call me at your earliest convenience so that we can discuss the appropriate next steps. At this point, I believe it is in the interest of both parties to request additional time to consider this new information and its impact on the appeal. I apologize for any inconvenience this causes but I was not aware of this information until yesterday, December 15, 2009.

Sincerely,

James M. Whisman
Senior Deputy Prosecuting Attorney
Appellate Unit Chair
King County Prosecutor's Office
206-296-9660

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEJANDRO GARCIA-SALGADO, Petitioner.	)))))))))	NO. 831564

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JAMES WHISMAN, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ALEJANDRO GARCIA-SALGADO 311046 AIRWAY HEIGHTS CC PO BOX 1899 AIRWAY HEIGHTS, WA 9901	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JANUARY, 2010.

X_____

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